FILE COPY

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1938.

No. [redacted] 34

ESTATE OF CHARLES HENRY SANFORD, Deceased,
Jennie R. Baird, Substitutionary Administratrix, c.t.a.,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Estate of Charles Henry Sanford, Deceased, Jennie R. Baird, Substitutionary Administratrix, c.t.a., petitions for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Third Circuit rendered on March 25, 1939, which affirmed a decision of the United States Board of Tax Appeals made on April 14, 1938, sustaining a deficiency asserted by the Commissioner of Internal Revenue.

The Nature of the Proceeding.

The appeal instituted in the Board of Tax Appeals was to review a deficiency in Federal gift taxes for the year 1924 amounting to $1,000,745. Sanford, the decedent, died in 1928, a resident of Monmouth County, New Jersey. In 1913,

Sanford created certain trusts, of which Guaranty Trust Company of New York was Trustee, reserving full powers of revocation. In 1919, some five years prior to the passage of the first Federal Gift Tax Act in 1924, Sanford surrendered the power of revocation, reserving only the right to modify the trusts, which right expressly excluded any right or privilege to revest in himself the principal or income of the trusts. On August 21, 1924, after the passage of the Gift Tax Act, Sanford surrendered the reserved right to modify. The value of the corpus of the trusts on August 21, 1924, was $6,846,225.06.

The Board of Tax Appeals held that a gift subject to the gift tax did not occur until 1924 when the limited right of modification was terminated, and sustained a deficiency computed upon the full value of the corpus of $6,846,225. The petitioner appealed to the Circuit Court of Appeals for the Third Circuit, and it is the decision of the Circuit Court of Appeals affirming the Board which the petitioner seeks to review in this Court.

The Question Presented.

The single question involved is whether a gift made in trust is subject to the Federal gift tax in the year the settlor irrevocably relinquishes the power to revest in himself the income or corpus of the trust, reserving a power to modify in other respects (such as the power to change beneficiaries), or in a later year when the remaining power to modify is surrendered, the trust concededly being a valid and enforceable trust and not failing for the lack of a donee.

Summary Statement of Matter Involved.

On December 24, 1913, Sanford set up certain trusts, naming Guaranty Trust Company of New York as Trustee, and transferred certain property to the Trustee. The Trustee was directed to collect the income and profits and to distribute the income and ultimately the principal among the

named beneficiaries. The indenture reserved to Sanford the right to revoke the trusts. On November 26, 1919, Sanford surrendered the power to revoke, retaining only a power to modify—

> "but this right of modification, however, shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument."

On August 21, 1924, Sanford surrendered and renounced all the remaining powers over the trusts.

Originally no gift tax return for 1924 was filed, but in the fall of 1934, following an interview with an examining revenue agent, the representative of the estate filed a gift tax return with the Collector of Internal Revenue in Newark, listing the property comprising the corpus of the trusts on August 21, 1924, but disclaiming any liability for tax. On audit of this return, the Bureau of Internal Revenue first issued a tentative ruling (unpublished) upholding the tax on the ground that the gift was not complete until the surrender of the power to modify in 1924. Some two months later, after hearing representatives of the estate, the Assistant General Counsel for the Bureau promulgated a second ruling (also unpublished), which, unlike the earlier ruling, quoted and applied Article 1 of Regulations 67 (1924 Edition) promulgated under the Gift Tax Act of 1924 and held that there was no gift tax payable since—"So far as Sanford was concerned the gift was complete on the date when he relinquished the right to terminate the trusts."

This second ruling was approved by the Under-Secretary of the Treasury, and the estate was advised that an examination of the return "discloses no gift tax liability."

The case remained closed for some two and a half years. On July 26, 1937, the Circuit Court of Appeals for the Second Circuit handed down its decision in *Hesslein* v. *Hoey*, 91 F. (2d) 954. In conformity with the Treasury's final ruling in the *Sanford* case, the Government in the

Hesslein case contended that in the case of a gift in trust the gift tax attaches at the point when the settlor surrenders the power to revest in himself income or principal, which in the *Hesslein* case occurred on the creation of the trust. The Second Circuit, nevertheless, decided against the Government and sustained the taxpayer, Judge Swan writing for himself and Judge Manton; Judge Augustus N. Hand dissenting.

Following the decision in the *Hesslein* case, the *Sanford* case was reopened, and in an unpublished memorandum the Chief Counsel, after saying that the second Sanford ruling "gives full effect to the [Commissioner's] regulations," nevertheless directed the issuance of a deficiency letter against the Sanford Estate, which letter was delivered a day or two before the running of the statute of limitations.

The Government applied to this Court for a writ of certiorari in the *Hesslein* case, but the application was denied (302 U. S. 756).

Article 1 of Regulations 67 (1924 Edition) has not been changed but remains in effect, unaltered, today.

The Stipulation of Facts of record in this (the Sanford Estate) case contains the following paragraph (R. 21):

> "9. In his administration of the Gift Tax Act of 1924 and the Gift Tax Act of 1932, and prior to the promulgation of the decision in the case of Hesslein v. Hoey, 91 Fed. (2) 954, decided July 26, 1937, it has been the uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved to treat the taxable transfer subject to the gift tax as occurring when the transferor relinquished all power to revest in himself title to the property constituting the subject of the transfer. It is estimated that approximately 300 cases of such character have been closed or were adjusted in accordance with the above practice."

Unlike the present record, the record in the *Hesslein* case was very meager; the Court did not have before it (and in the application for certiorari this Court did not have before it) the care with which the Treasury considered the

question in the *Sanford* case, terminating in the second ruling; it did not have before it the uniformity of the Commissioner's Regulations since 1924 and the consistent and uniform practice of the Commissioner in administering the Gift Tax Acts; and it did not have before it the illuminating comments made in Congress at the time of the enactment of the Gift Tax Act of 1924, definitely sustaining our interpretation (See *infra*, p. 15).

The Circuit Court of Appeals for the Third Circuit, after referring to the *Hesslein* case, said (R. 76, 77):

> "Despite a dissent by one of the Circuit Court Judges, the Supreme Court denied certiorari * * *. Had it not been for the ruling by the Second Circuit and the action of the Supreme Court in denying certiorari, we would have favored the view that the tax was imposed on the transfer of property and that the transfer took place when the trustee was given such possession that the settlor could not regain it for himself or his estate."

Reasons Why the Writ of Certiorari Should Issue.

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

Whatever rule is adopted in this case must necessarily control future transfers of similar character. The decision of the Court below, if allowed to stand, will result in flagrant and widespread avoidance of Federal income taxes. The Gift Tax Act of 1924 was enacted as part of the Revenue Act of 1924. The Income Tax Title of that Act included a new section, Section 219 (g), which read as follows:

> "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, *the power to revest in himself title to any part of the corpus of the trust,* then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." (Italics ours.)

Under the clear implication of this language, when a trust is made irrevocable, that is to say, when the grantor ceases to have "the power to revest in himself title to any part of the corpus of the trust", the burden of paying income taxes in respect of the income from the trust shifts from the grantor to the trust estate, a rule which has been consistently applied. *Knapp v. Hoey,* 24 F. Supp. 39; *Phebe W. M. Downs,* 36 B. T. A. 1129; *Thomas H. Blodgett,* B. T. A. (memo) Dkt. No. 87180, March 11, 1938 (C. C. H. Dec. 10004-B). For income tax purposes, the test is the existence or absence of the grantor's *control* over the corpus (and hence the income) *for himself,* a rule which was upheld in *Corliss* v. *Bowers,* 281 U. S. 376.

But if for gift tax purposes the Federal gift tax is postponed until the surrender of the power of modification, there is no deterrent preventing a wealthy individual from relieving himself of burdensome income surtaxes in respect of a large part, if not all, of his property by the simple expedient of making gifts in trust to members of his immediate family or friends, in which he relinquishes the power to revest in himself income or principal and reserves a power to change beneficiaries, which, of course, need never be exercised. In this simple fashion a taxpayer may split up his wealth and so cut many times the income tax revenues, yet escape the exaction of any gift tax. The Treasury in considering the *Sanford* case was quick to see the magnitude of such an income tax loophole.*

The gift tax will supplement and protect the estate tax equally well, whichever interpretation is adopted. In the

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* In submitting the second Sanford ruling to the Under-Secretary of the Treasury, a high Treasury official wrote (R. 40):

> "I am now convinced that the position tentatively taken in the prior opinion should not be maintained, and that its possible prejudicial results upon the revenues both from gift tax and income tax far outweigh the considerable revenue we would gain from asserting a gift tax liability against this trust."

case of the creation of an *inter vivos* trust, if any power remains outstanding at death, whether a power of revocation and revestment or merely a power to alter or amend, the trust corpus falls within the gross estate for estate tax purposes (Section 302(d) of the Estate Tax Act of 1924), subject to the statutory gift tax credit in the event of the imposition of a prior gift tax (Section 322 of the Revenue Act of 1924). If no power remains outstanding at death, the corpus is not a part of the gross estate, but a gift tax necessarily must have been paid prior to the removal of the property from the scope of the estate tax, regardless of whether the gift tax is imposed at the time of the surrender of the power to revest or, later, on the surrender of the power to modify. Accordingly, on whichever date the gift tax is imposed, it will implement equally well the estate tax, for in either case the collection of a gift tax on the full corpus of the trust is assured before the corpus is excluded from the estate tax.

But there is this important difference. If the gift tax does not arise until the right to modify is surrendered, all gift taxes may readily be avoided by the simple expedient of retaining the power until death, when the estate tax in any event will be collected. And in the interval the taxpayer has successfully relieved himself of the heavy income surtaxes and thus escaped his just burden of taxation. The doctrine of the decision below is a doctrine of tax postponement and tax avoidance.

In construing a statute, the intention of Congress is controlling. It could hardly have been the intention of Congress that the gift tax be applied in such a fashion as to render inharmonious the administration of the three main classes of taxes, income, gift and estate, when such an application would result in grave loopholes of tax avoidance. Yet this is the effect of the decision below. Before such an interpretation becomes finally established, the rule should be considered and reviewed by this Court.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

The decision below, we submit, is sharply in conflict with the decisions of this Court in *Burnet* v. *Guggenheim*, 288 U. S. 280, and *Helvering* v. *Reynolds Tobacco Co.*, No. 328, decided January 30, 1939.

In the *Guggenheim* case, this Court held that in the case of a gift in trust originally revocable but later made irrevocable by the surrender of the reserved power to revoke, the Federal gift tax attached on the surrender of the power to revoke. There the reserved power, later surrendered, was a power to revoke, modify or alter, but Mr. Justice Cardozo, who wrote for the Court, throughout his opinion referred to the power in every instance as "the power of revocation" or "the power to revest title in himself", and such like. "Congress", said this Court, "did not mean that the tax should be paid twice, or partly at one time and partly at another." And again, "There must be a choice, and a consistent choice, between the one date and the other. To arrive at a decision, we have therefore to put to ourselves the question, which choice is it the more likely that Congress would have made?" In selecting the date when the power of revocation was surrendered, the Court concluded that the statute "is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall." The clear implication is that when "put beyond recall", a taxable gift occurs. This happens when the settlor surrenders the power to revest in himself title to the corpus and income of the trust. The decision below, withholding the tax even after the gift in trust was "put beyond recall", is sharply in conflict with the decision of this Court in the *Guggenheim* case.

The decision below is in conflict with the decision of this Court in *Helvering* v. *Reynolds Tobacco Co.*, No. 328, decided January 30, 1939. That case involved the question whether a corporation realizes gain or loss on the purchase or sale

of its own stock. From 1920 to 1934, the administrative construction placed upon the applicable provision of the revenue laws as embodied in the Commissioner's formally promulgated regulations was uniform and consistent. In 1934, the Treasury changed its regulations. In upholding the interpretation adopted in the original regulations, this Court announced the rule that since the original regulations had received legislative approval by reenactment of the underlying statutory provisions, such regulations have the force of law, and, therefore, "Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed."

In the field of gift taxes, Article 1 of the Commissioner's Regulations 67, issued directly on the passage of the Gift Tax Act of 1924, unequivocally provided that "a taxable transfer will be treated as taking place in the year in which" the grantor terminates "the power to revest in himself title to the corpus of the trust." With this regulation outstanding, Congress in 1932 reenacted the Gift Tax Act in the same language as used in the 1924 Act. Article 1 of Regulations 67 (1924 Edition) is still outstanding and in effect, unaltered in any respect, and today represents the Commissioner's formal interpretation of the Gift Tax Act of 1924. Yet the Court below failed to apply the clear rule of the regulation, which in view of the *Reynolds Tobacco* case must now be considered as having the force of law.

Prayer.

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and

determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioner be granted such other and further relief as may be proper.

ESTATE OF CHARLES HENRY SANFORD, Deceased,
Jennie R. Baird, Substitutionary
Administratrix, c.t.a.

By JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
WILLIAM A. CARR,
Her Attorneys.

Dated, New York, N. Y., April 14, 1939.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The memorandum opinion of the Board of Tax Appeals is unreported but appears at R. 47; the opinion of the Circuit Court of Appeals is unreported but appears at R. 72.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 25, 1939. The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, 28 U. S. Code § 347a, as amended by the Act of February 13, 1925.

Statement of the Case.

A summary statement of the facts is given in the petition, pp. 2-5, above.

Statutes Involved.

The statutes involved are set forth in an Appendix attached to the brief.

POINT I.

The incidence of the gift tax is upon the transfer by the donor and not upon the receipt by the beneficial taker.

The statutory language is as follows:

> "* * * a tax * * * is hereby imposed upon the transfer * * * by gift * * * of any property * * *."

Clearly, the incidence of the tax is upon the *transfer* by the *donor* and *not* upon the *receipt* by the beneficial taker. Had Congress intended to lay the tax on the receipt, it would have said so.

Following the enactment of this Act, the Commissioner promulgated his formal regulations interpreting the statute. Article I of Regulations 67 provides that on the creation of a trust "where the grantor retains the power to revest in himself title to the corpus of the trust" no gift subject to the tax occurs, but—

> "Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated."

This Regulation remains in full force and effect, unaltered and unamended, even to this day. This is not surprising, for the rule of the Regulation has received explicit Congressional approval as evidenced, first, by the reenactment of the Gift Tax of 1932 in the same language as the 1924 Act*, and, second, by the incorporation in the later statute of a new section (Sec. 501(c)), which expressly adopted the language of the 1924 regulation. Section 501(c) provided that "the

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* The 1932 Act laid "a tax * * * upon the transfer * * * of property by gift."

relinquishment or termination" of "the power to revest in the donor title to" the trust property "shall be considered to be a transfer by the donor by gift of the property subject to such power." With reference to the 1924 Regulation and Section 501(c) this Court said in the *Guggenheim* case, *supra* (p. 283): "We think the regulation, and the later statute construing it, are declaratory of the law which Congress meant to establish in 1924." Following the decision in the *Guggenheim* case, Congress repealed Section 501(c) as no longer necessary, for, as the accompanying House and Senate Committee Reports stated it, "The principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court's decision in the *Guggenheim* case."* Under these circumstances, the Regulations issued under the 1924 Act should be interpreted as if Section 501(c) were still in effect. It is hard to conceive of a clearer case of legislative approval of the Commissioner's regulations.

The Regulations issued under the Revenue Act of 1932 adopted and continued the rule of the 1924 Regulations. (See Article 3, Regulations 79 (1933 Edition); Article 3, Regulations 79 (1936 Edition)).

As a matter of administrative practice, from the enactment of the first Gift Tax Act in 1924 until the *Hesslein* decision was announced in 1937 the Commissioner uniformly applied the rule of the Regulations, and some 300 cases have been closed accordingly (p. 4, *supra*).

It is the established rule of the decisions of this Court that where such uniformity in published Regulation and departmental practice has existed over a long period, the rule will not be disturbed, particularly where there has been a subsequent reenactment of the statute without change. *Logan* v. *Davis*, 233 U. S. 613, 627 (1914); *Brewster* v. *Gage*, 280 U. S. 327, 336 (1930); *Mass. Mutual Life Ins. Co.* v. *U. S.*, 288 U. S. 269, 273 (1933). In the *Mass. Mutual Life*

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* House Rep. No. 704, 73d Cong., 2d Sess., p. 40; Sen. Rep. No. 558, 73d Cong., 2d Sess., p. 50.

Ins. case, *supra,* (an income tax case), this Court said that the subsequent action of Congress—

> "was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute * * *."

This rule has only recently been given added weight in the *Reynolds Tobacco Company* case, decided this Term on January 30, 1939 (see pp. 8-9, *supra*).

To delay the gift tax until the surrender of the power to modify, as the Court below has decreed, is to ignore the force and effect of an unambiguous Regulation and the consistent administrative practice followed for thirteen years; to ignore the clear legislative approval of the Regulation by the enactment of the second Gift Tax Act without change of language and the incorporation in such Act of the language of the Regulation; and to ignore the statement of this Court in the *Guggenheim* case (p. 283) that "the regulation, and the later statute construing it, are declaratory of the law which Congress meant to establish in 1924."

POINT II.

The debates in Congress occurring at the time of the enactment of the 1924 Gift Tax Act evidence a legislative intent directly in conflict with the decision of the Court below.

The bill which later became the Gift Tax Act of 1924 was defeated in the Committees of both Houses, but when the Revenue Bill of 1924 was introduced in the House and the Senate, Representative Green, Chairman of the House Com-

mittee, and Senator Walsh of Massachusetts, Chairman of the Senate Committee, introduced an amendment on the floor of the House and Senate, which ultimately was enacted as the Gift Tax Act of 1924. During the course of the debates, Representative Green, Senator Walsh and Representative Garner, also an earnest advocate of the bill, repeatedly stated that one of the major purposes in imposing a tax on gifts was to create a deterrent in the splitting up of large estates, with the consequent loss of income surtaxes. For example, Representative Green stated that the proposed amendment was a corollary of the estate tax necessary to prevent estate tax avoidance, and then continued (65 Cong. Rec., 1st Sess., 3120):

> "This amendment also is needed on account of the income tax. The splitting up of large estates, of course, reduces the amount of surtaxes to be laid upon the party who so divides them. We have lost more, in my judgment, by the division of these large estates in our income taxes than we have lost by reason of tax exempt securities."

This is only one of a number of instances where the same purpose was voiced by the sponsors of the bill.* Yet under the interpretation which the Court below has given to the Act, the gift tax will not act as any deterrent (see p. 6, *supra*), and thus the decision below defeats one of the major purposes of the gift tax legislation.

Again, when the Revenue Bill of 1932 was reported out of Committee, the Committee Reports of both Houses† contained the following statement:

> "The gift tax will supplement both the estate tax and the income tax. It will tend to reduce the incentive to make gifts in order that distribution of future income

* 65 Cong. Rec., 1st Sess., pp. 3172; 3173; 8095-6; 8096.

† House Rep. No. 708, 72nd Cong., 1st Sess., p. 28; Sen. Rep. No. 665, 72nd Cong., 1st Sess., p. 40.

from the donated property may be to a number of persons with the result that the taxes imposed by the higher brackets of the income tax law are avoided. It will also tend to discourage transfers for the purpose of avoiding the estate tax."

POINT III.

The decision below is in conflict with the decisions of this Court in the *Guggenheim* case and the *Reynolds Tobacco* case.

The *Guggenheim* case and the *Reynolds Tobacco* case are discussed at pages 8-9 of the petition.

In the latter part of Mr. Justice Cardozo's opinion in the *Guggenheim* case, certain comments were made which were misinterpreted by the Circuit Courts of Appeals. Mr. Justice Cardozo said that the imposition of a gift tax upon the value of the trust corpus would be a hardship "when nothing has been done to give assurance that any part of the principal will ever go to the donee." In relying upon this statement, the Courts below overlooked the fact that this Court was considering a *revocable* trust, and that the statement was addressed to the contention that a completed gift occurred on the *creation* of a revocable trust. Clearly the statement was not aimed at, and it cannot properly be applied to, a case where the trust has become *irrevocable* by the settlor's surrender of all power to revest in himself income or corpus. In the one case there is in reality no permanent donee, for by exercising the power of revocation the grantor may undo everything that he has done. But after a grantor has surrendered the power to revest corpus and income in himself, the trust is final and permanent and a final and permanent donee exists, namely, the trust estate,* for while under the

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* *Commissioner v. Krebs*, 90 F. (2) 880 (C. C. A. 3d); *Commissioner v. Wells*, 88 F. (2) 339 (C. C. A. 7th).

reserved power to modify the grantor may change the beneficiaries, such a power is a special power in trust* and he no longer can retake the trust corpus or destroy the gift. In such a case, the payment of the tax upon the surrender of the power to revest creates no hardship, whether the tax is collected from the donor or, on the donor's inability to pay, from the trust estate. There exists a definite and final donee and a definite and completed gift in trust, regardless of the power to appoint to a new beneficiary, since the power cannot be exercised in favor of the grantor and the trust thus destroyed.

Mr. Justice Cardozo also said that the gift tax and the estate tax are parts of the same Title and that the two statutes are in *pari materia*. Relying upon this comment the Circuit Courts of Appeals erroneously concluded that the gift tax and the estate tax should receive like application in the sense that since the estate tax embraces an *inter vivos* gift subject to a power to alter or amend, the gift tax should be construed as excluding an *inter vivos* transfer so long as a power to alter or amend remains outstanding. But plainly from the context Mr. Justice Cardozo advanced the similarity only to support his ultimate conclusion that in applying the gift tax form should not be exalted over substance; certainly there is nothing in the opinion justifying the inference that because Section 302(d) of the Estate Tax Act brings into the gross estate the corpus of a trust subject to a power to alter and amend, the tax on gifts *inter vivos* should be delayed so long as a power to alter or amend remains outstanding.

In *Porter v. Commissioner*, 288 U. S. 436, an estate tax case involving the existence at death of a power to alter (decided shortly after the *Guggenheim* case), this Court itself has recognized the difference in character of the two statutes. After pointing out that the estate tax provisions cover dis-

* See New York Real Property Law, §§135, 138 and 144 (applicable equally to personal property, *Cutting* v. *Cutting*, 86 N. Y. 522; *Hutton* v. *Benkard*, 92 N. Y. 295).

junctively the several classes of powers, it was said (p. 443): "*So far as concerns the tax here involved* [i. e. the estate tax], there is no difference in principle between a transfer subject to such changes and one that is revocable."

Clearly the estate tax is operative, whether the power outstanding on death is the power to revoke or the power to alter or amend. The estate tax by its nature is a final tax. But the gift tax, unlike the estate tax, is an intermediate and not a final tax. Unless the gift tax is imposed at the point when the obligation to pay income surtaxes shifts from the grantor to the trust estate, the gift tax will be definitely out of harmony with the income tax, resulting in widespread income surtax avoidance. This would defeat one of the major purposes of Congress in enacting the gift tax; and at the same time add nothing in supplementing or protecting the estate tax.

Conclusion.

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

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William A. Carr,
Attorneys for Petitioner.

Dated, New York, N. Y., April 14, 1939.

APPENDIX.

The Gift Tax Statutes.

Section 319 of the Revenue Act of 1924:

"For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: * * *"

Section 501 of the Revenue Act of 1932:

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

* * * * * * * *

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift."

[Subdivision (c) of Section 501 was later repealed by Section 511 of the Revenue Act of 1934. See Brief, p. 13, *supra.*]

The Gift Tax Regulations.

Article 1, Regulations 67 (1924 edition):

"The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the

trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated."

Article 3, Regulations 79 (1933 edition):

"Transfers in trust.—Where property is transferred in trust without an adequate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, but, where the donor reserves such power, the transfer does not constitute a gift within the meaning of the statute. The relinquishment or termination, without an adequate and full consideration in money or money's worth, of the power to revest in the donor title to property transferred in trust, is a gift of such property at the time of the relinquishment or termination of the power, except where the power is terminated by the donor's death."

Income and Estate Tax Provisions Covering Reserved Powers.

Section 219 (g) of the Income Tax Act of 1924:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

Section 302 of the Estate Tax Act of 1924:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *—

(a) To the extent of the interest therein of the decedent at the time of his death * * *

* * * * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;"